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Abstract

In this paper I look at one particular exegetical complex through which, I will argue, the rabbis grapple with the question of legal jurisdiction and the status of revelation in the shadow of Roman legal hegemony. I will try to show that rabbinic midrash *in its literariness* (that is, as a source for the history of ideas, rather than a repository of more or less viable data for reporting history on the ground) is a valuable site for mining the *mentalité* of tannaitic culture (to the extent that we can posit such a thing), and specifically of tannaitic constructions of the *idea of the law* from the perspective of the subaltern.

Disciplines

Islamic World and Near East History | Jurisdiction | Legal | Religion

The Boundaries of the Law and the Problem of Jurisdiction in an Early Palestinian Midrash

NATALIE B. DOHRMANN*

As the boundaries of the rabbinic movement continue to retreat before the critical gaze of scholars, there has been a concurrent reassessment of the nature of rabbinic literature as source and as evidence.¹ What is one to do with all this literature? Historians grapple variously with this question. At one end of the spectrum is work such as that of Hannah Cotton, who consciously marginalizes rabbinic evidence in her assessment of the legal documents from the Judean Desert.² At the other end are scholars such as Richard Kalmin, who more recently argued that "the rabbinic portrayals [of relations between rabbis and non-rabbis] *can be used* to describe social reality,"³ bringing a newly critical hermeneutics to the task of reading the Talmud. A corrective to what Seth Schwartz calls "rabbinocentrism"⁴ not only concerns the historian's valuation of rabbinic texts as evidence, but their literary-critical treatment as well. The minimizing trend redefining the socio-historical context of rabbinic literature forces the modern reader to return to the material with new hermeneutical lenses, tinted by revised notions of normativity, audience, place, and authority.

In this paper I look at one particular exegetical complex through which, I will argue, the rabbis grapple with the question of legal jurisdiction and the status of revelation in the shadow of Roman legal hegemony. I will try to show that rabbinic midrash *in its literariness* (that is, as a source for the history of ideas, rather than a repository of more or less viable data for reporting history on the ground) is a valuable site for mining the *mentalité* of

* My thanks to Catherine Hezser, Bernard Jackson, Hannah Cotton, Martin Jacobs, Elsie Stern, and the wonderful fellows at the Center for Advanced Judaic Studies at the University of Pennsylvania for their comments and advice at various stages.

¹ The minimalism is exemplified in the work of Seth Schwartz, Shaye Cohen, Hayim Lapin, Lee Levine, Catherine Hezser, Hannah Cotton, Jacob Neusner and others (for specific examples, see works cited below).

² H. M. Cotton, "The Guardianship of Jesus son of Babatha: Roman and Local Law in the Province of Arabia", *JRS* 83 (1993), 98–100.

³ Richard Kalmin, *The Sage in Jewish Society of Late Antiquity* (London: Routledge, 1999), 27.

⁴ Seth Schwartz, *Imperialism and Jewish Society, 200 B. C. E. to 640 C. E.* (Princeton: Princeton University Press, 2001), 112 n. 23 and *passim*.

tannaitic culture (to the extent that we can posit such a thing), and specifically of tannaitic constructions of the *idea of the law* from the perspective of the subaltern.

The text I will focus on is the prolegomenon to tractate Neziqin, the tractate on Damages in the Mekilta de-Rabbi Ishmael, a tannaitic commentary on the book of Exodus.⁵ The section is a midrash on Ex. 21:1:

ואלה המשפטים אשר תשים לפניהם

And these are the ordinances (mishpatim) which you shall set before them (Ex. 21:1).

I think it will be helpful to cite the text as a whole up front, and then make reference to smaller sections as the paper progresses.

Mekilta de-Rabbi Ishmael – Neziqin 1 (Ex. 21:1)⁶

ואלה המשפטים

רבי ישמעאל אומר אלו מוסיפין על העליונים מה עליונים מסיני אף תחתונים מסיני רבי עקיבא אומר ואלה המשפטים וגו' למה נאמר לפי שהוא אומר דבר אל בני ישראל ואמרת אליהם אין לי אלא פעם אחת מנין שנה ושלש ורבע עד שילמדו ת"ל ולמדה את בני ישראל יכול למדן ולא שונון ת"ל שימה בפייהם יכול שונים ולא יודעין ת"ל ואלה המשפטים אשר תשים לפנייהם ערכם לפנייהם כשלחן ערוך כענין שנאמר אתה הראית לדעת

רבי יהודה אומר ואלה המשפטים במרה נאמרו שנאמר שם שם לו חק ומשפט רבי אלעזר בן עזריה אומר והרי הגוים שדנו בדיני ישראל שומע אני יהיו דיניהם קיימים ת"ל ואלה המשפטים אשר תשים לפנייהם אתה דן את שלהם והם אינם דינין את שלך מכאן אמרו גט המעושה בישראל כשר ובגוים פסול אבל גוים חובטין אותו ואומרים לו עשה מה שישראל אומרים לך

רבי שמעון בן יוחי אומר מה ראו דינין לקדם לכל המצות שבתורה שכשהדין בין אדם לחבירו תחרות ביניהם נתפסקו להם הדין נעשה שלום ביניהם וכן יתרו אומר למשה אם את הדבר הזה תעשה וגו' וגם כל העם הזה על מקומו יבא בשלום.

And these are the ordinances [which you shall set before them] (Ex. 21:1):

(1) Rabbi Ishmael says: These are added to the ones above. Just as those above are from Sinai, so too these below are from Sinai.

(2) Rabbi Akiba says: *And these are the ordinances ...* – Why is this said? Since it says, *Speak to the children of Israel and say to them ...* (Lev. 1:2) – I only know that he was to tell them once. How do we know that he was to repeat it to them a second, third and fourth time until they have learned it? Scripture says, *And teach it to the children of Israel* (Deut. 31:19) – This might mean that they should learn it and not repeat it. Scripture says, *Put it in their mouths* (Deut. 31:19) – This might mean that they need only to repeat it and not understand it. [Therefore] Scripture says, *And these are the ordinances which you shall set before them* – Arrange them in proper

⁵ The Hebrew will be quoted from the Lauterbach edition unless otherwise noted – Jacob Z. Lauterbach, ed., *The Mekilta de-Rabbi Ishmael* (Philadelphia: Jewish Publication Society, 1933–35). Henceforth JZL followed by volume and page number(s). I will also key each passage to the Horowitz-Rabin edition – H.S. Horowitz and I.A. Rabin, *Mekhilta d'Rabbi Ismael cum variis lectionibus et adnotationibus* (Jerusalem: Bamberger et Wahrman, 1960). Henceforth H-R followed by page number(s). All translations are my own.

⁶ JZL 3:1–2, H-R 246–247.

order before them like a set table, as it says, *It was shown to you so that you might know* (Deut. 4:35).

(3) Rabbi Judah says: *And these are the ordinances* – these were commanded at Marah, as it says, *He set for him there a statute and an ordinance* (Ex. 21:25).

(4) Rabbi Eleazar ben Azariah says: Now whenever the gentiles were to judge according to the laws of Israel, I might think that their decisions are valid. Scripture says [to Moses] *And these are the ordinances which YOU shall set before them* – You [O Israel] may judge theirs but they may not judge yours. On the basis of this interpretation they [sages] say: A bill of divorce given by force, if by Israel, it is valid, if by the nations, it is not valid. But [it is valid if] gentiles force him [the husband] and say to him: “Do as the Israelite authorities tell you.”

(5) Rabbi Simon ben Yochai says: Why do the ordinances of the law precede all the commandments of the Torah? Because as long as there is a lawsuit between a man and his neighbor, there is strife between them – but as soon as the case is decided, peace is established between them. And therefore Jethro says to Moses, *If you do this thing [as God commanded you, you will be able to endure.] And all this people shall go to his place in peace* (Ex. 18:23).

The biblical setting of Exodus 21:1 is Mt. Sinai, where, following the revelation of the Ten Commandments and the altar laws, God tells Moses to deliver the *mishpatim* (ordinances) to Israel – the so called Covenant Code. In the heart of this pericope, the Mekilta preserves a tradition in the name of Rabbi Judah:

רבי יהודה אומר ואלה המשפטים במרה נאמרו שנאמר שם שם לו חק ומשפט.

Rabbi Judah says: *And these are the ordinances* – these were commanded at Marah, as it says, *He set for him there a statute and an ordinance* (Ex. 21:25).

The first job for any rabbinic exegete approaching a biblical *lemma* is to indicate its proper biblical context. That is perhaps his most vital interpretive gesture. R. Judah says that the *mishpatim* (ordinances) were revealed at Marah when Israel stopped on its journey through the desert. It is located on the far side of the Red Sea, *before* Mt. Sinai. In Ex. 15:25, the text says that while in Marah God *set for him there a statute and an ordinance* (שם שם לו חק ומשפט). The midrashic leap from Sinai to Marah is sparked by a set of related hermeneutical impulses. The main one is the unspecified referent of Ex. 15:25. According to Exodus 15, in Marah, God delivers *a statute and an ordinance*. But the question of the content of those laws is left unanswered. Through its use of shared terms, Ex. 21:1, however, comes to disclose that the laws *apparently* revealed at Sinai were *in fact* revealed at Marah: the term *mishpat* (ordinance) appears in both contexts, as well as the phrase לשים ל- /לפני (to set to/for). Thus the exegete has found the Marah laws that had gone missing.

The association between the ordinances in Ex. 21 ff and the laws at Marah is a fairly common one in tannaitic literature, and appears, explicitly or tacitly, in a number of places.⁷ In this paper I will trace the cultural genealogy of the

⁷ Cf. b. San 56a/b; Mekilta Neziqin 1, Vayassa 2, Amalek 4; MRS on Ex. 21:1; Targum Yerushalmi Ex. 15:25–26. In amoraic literature it is a frequent motif. Cf. PRK

recurrent idea that the *mishpatim* were revealed at Marah, and in so doing, will try to determine the concerns that motivate the rabbis' hermeneutical move, especially as they relate to this particular pericope. I will argue that the relocation of the *mishpatim* from Sinai to Marah is the central axis anchoring a matrix of interpretations that make up an ongoing negotiation in this text. In rabbinic discussions here and elsewhere it leads to reflections on the ownership of the law, the ideal of authority, and jurisdiction. Ultimately, through this exegetical strategy we can discern strategies for cultural accommodation through which the text makes ideological space in which to reimagine the nature of the divine law in such a way that it roughly "coincides" with the Roman view of the same.

Once in play, the link binding the *mishpatim* to Marah shapes the sorts of questions brought to the verse, and through the midrashic allusion, Marah becomes a persistent presence in exegeses of Ex. 21:1. Still, since there is nothing inevitable or natural about the connection, we need to ask what animates the analogy's cohesion and persistence, and second, to ask to what extent a common trope constrains or determines other exegetical outcomes. These questions might be considered the literary complement of Hayim Lapin's call to question the "autonomy and naturalness of ancient Jews and Judaism as historical entities"⁸ That is, by underscoring what is external, conventional, and unnatural in a trope or exegesis, one can better access its function and significance as legal or cultural figure.

Rabbi Judah's *derash* is the center piece of the opening pericope of tractate Neziqin, and is the third of five interpretations of Ex. 21:1 brought by five prominent *tannaim*: Ishmael, Akiba, Judah, Eleazar ben Azariah, and Simon ben Yochai. The redactor connects these five exegeses into a well-crafted introduction. The passage's inclusion of aggadic (non-legal) material in a generally unrelievedly halakhic, or legal, tractate, is striking. As a prominent gateway to the collection of ordinances, or *mishpatim*, that follow the Ten Commandments, the pericope's peregrinations construct a frame through which to see the rest of the laws.⁹ A close reading reveals that the redactor has collected five rabbinic opinions and set them into a dialogue which addresses

12:8; Ex. R. 25:7; Tanhuma (B) Mishpatim; Seder Olam 5. The tradition is tacitly confirmed in many places, such as the idea that God *taught him there a tree* (read: Torah) וְיִרְדּוּ יְהוָה עֵץ, and that the three days of thirst were really three days of deprivation from Torah study. In one form or another, the law seems to have been connected firmly to Marah.

⁸ Hayim Lapin, *Economy, Geography, and Provincial History in Later Roman Palestine* (Tübingen: Mohr Siebeck, 2001), 11.

⁹ This may be seen as analogous to the importance of the introductory *sugya* of a tractate of the Babylonian Talmud – which may be a loaded literary excursus creating a thick web of themes and problems as an introduction to the broader topics of the tractate.

the question of *ownership* of the law, and in so doing asserts a sense of the proper boundaries of Torah's jurisdiction. I will view R. Judah's interpretation in the context of this broader discussion to see how it imagines, creates and wields legal authority. I shall also show how the insecurity provoked by Roman power has worked its way into the literary fabric of the text.

The section begins with Rabbi Ishmael who asserts that the *mishpatim* in Ex. 21:1 were delivered at Sinai together with the Decalogue, just as it appears:

רבי ישמעאל אומר אלו מוספין על העליונים מה עליונים מסיני אף תחתונים מסיני.

Rabbi Ishmael says: These are added to the ones above. Just as those above are from Sinai, so too these below are from Sinai.

In the midrashic context, Ishmael's interpretation serves to stress the importance of Sinai as the basis of the authority of the *mishpatim*.¹⁰ His resistance to Marah makes sense in the larger picture that the pericope draws. To show this I need first to examine the significance of Marah. It is useful to look back at the Mekilta's own treatment of this verse in Vayassa 1 to Ex. 15:25:¹¹

שם שם לו חק ומשפט ... רבי אלעזר המודעי אומר חק אלו עריות שנאמר לבלתי עשות מחוקות התועבות ומשפט אלו דיני אונסין ודיני קנסות ודיני הבלות.

He set for him there a statute and an ordinance (Ex. 15:25) ...¹² Rabbi Eleazar ha-Moda'i says, *A statute* – these are the laws against incest, as it is said, *so not to do any of these abominable statutes* (Lev. 18:30), *And an ordinance* – these are laws of duress¹³, laws of fines,¹⁴ and laws of injuries.¹⁵

¹⁰ Compare Sifra, Aharei Mot 9.13.8 (Lev. 18:3): *And the Lord spoke to Moses saying, "Speak to the Israelites and say to them: I am the Lord your God"* (Lev. 18:2). R. Simeon b. Yochai says, He who said above *I am the Lord your God* (Ex. 20:2) – Am I the Lord whose kingdom you accepted upon yourselves in Egypt? They said to him: Yes. If Yes, you have accepted my sovereignty – they have accepted my decrees: *You shall have no other gods before me* (Ex. 20:2). He who said here, *I am the Lord your God* (Lev. 18:2): Am I the Lord whose kingdom you accepted upon yourselves at Sinai? They said to him: Yes. If Yes, you have accepted my sovereignty – they have accepted my decrees: *You shall not follow in the ways of the land of Egypt in which you have settled ... and you shall not walk in their statutes* (Lev. 18:3).

¹¹ Note that the Mekilta understands the lack of water at Marah as a lack of Torah study (דורשי רשומות). Vayassa 1 (JZL 2:89–90, H-R 154).

¹² This *derash* is part of a longer section. I omitted that of R. Joshua as follows: "A statute, this is the Sabbath, and an ordinance, this is honoring [your] father and mother, the words of Rabbi Joshua." R. Joshua connects the statutes and ordinances at Marah to Sabbath laws and the command to honor your parents. This is based largely on the phrase, *As the Lord your God commanded you* [יהוה אלהיך], in the past tense, used with each of these commands in the Deuteronomy version of the Decalogue, Deut. 5:12,17 – but spurred as well by the narrative drive to account for the Sabbath laws in connection with the Manna in Ex. 16; cf. b. Shab. 87b.

¹³ I follow the translations/interpretations of Kugel and Lauterbach here.

¹⁴ On fines, see Gedaliah Alon, *The Jews in their Land in the Talmudic Age (70–640 C.E.)*, translated and edited by Gershon Levi (Cambridge: Harvard University Press, 1989), 216–217.

R. Eleazar ha-Moda'i links *hoq* (statute) to the laws against incest and *mishpat* to the *dinim*, which, he implies, God gave Israel at Marah, not Sinai. Why there, and why *not* at Sinai? To understand the terse interpretations of Judah and Eleazar ha-Moda'i it is important to recognize the semantic and cultural associations which these legal corpora evoke. The first gloss, '*arayot*/incest, invokes Lev. 18, and hinges on the prominent and repeated appearance there of the two key terms *hoq* and *mishpat* (statute and ordinance)¹⁵ also used at Marah:

כמעשה ארץ מצרים אשר ישבתם בה לא תעשו וכמעשה ארץ־כנען אשר אני מביא אתכם שמה לא תעשו ובחקותיהם לא תלכו: את משפטי תעשו ואת חקתי תשמרו ללכת בהם אני יהוה אלהיכם: ושמרתם את חקתי ואת משפטי אשר יעשה אתם האדם וחי בהם אני יהוה.

You shall not follow the practice of the land of Egypt in which you settled. And you shall not do as they do in the land of Canaan to which I am bringing you. And you shall not walk in their *statutes*. But you shall do my *ordinances* and you shall observe my *statutes* to walk in them, I am the Lord your God. You shall keep my *statutes* and my *ordinances*, by whose doing man lives. I am the Lord. (Lev. 18:3–5)

Here *God's* statutes and ordinances (משפטי/חקתי) are starkly contrasted to those of the foreigners (חקות התועבות).¹⁷ Lev. 18 forbids foreign sexual practices, but the tannaitic treatment of this passage in Sifra (and elsewhere), extends the material. Sifra collects a wide spectrum of anxieties about foreign law and culture – its temptations, delights and dangers. The following brief but telling interpretations of Lev. 18:2–5 from Sifra, the Mekilta d'Arayot in Aharei Mot, highlight the thematic concerns sparked by the terms *hoq* and *mishpat* in a tannaitic text. This insertion into Sifra, thought to originate in the same "school" that produced the Mekilta de-Rabbi Ishmael, shows how '*arayot* encodes a set of questions about foreigners and the dangers of seduction, beyond the purely sexual.

ובחקותיהם לא תלכו וכי מה הניח הכתוב שלא אמרו ... ומה תלמוד לומר ובחקותיהם לא תלכו שלא תלכו בנימוסות שלהן בדברים החקוקין להן כגון תיטריות וקרקסאות והאסטירות.

You shall not walk in their statutes (Lev. 18:3) – What does the text leave out that it does not say? ... [the passage here lists specific foreign practices elsewhere enumerated as forbidden] why [then] does Scripture say, *You shall not walk in their statutes*? That you should not walk in their practices (*nimosot*) inscribed for them like theaters, circuses and arenas.

The darshan asks why the law is introducing a general category, "their statutes," here, although so many laws already forbid specific foreign practices.

¹⁵ Mekilta Vayassa 1 (Ex. 15:25), JZL 2:94, H-R 156–7, see also 96 and 179.

¹⁶ Note the addition of the category *hoq*. I include its meaning at Marah as well as that of *mishpat* since I suggest that Marah is significant as a counter-Sinai.

¹⁷ The terms frame the chapter, appearing multiple times in Lev. 18:3–4, 26, 30.

Why is this necessary? The answer is that the category refers to habits indigeneous to their way of life. Leviticus 18 prohibits the attendance of circuses, theaters and arenas. In this passage statutes are woven into the term *'arayot* to signify seductive Roman cultural institutions that corrupt the integrity of Jewish identity. Beyond the obviously flashy realm of entertainment, the next passage sees Roman temptation extending to the more insidious draw of the Roman court.

ושמא תאמר להם חוקים ולנו אין חוקים ת"ל את משפטי תעשו ואת (מצותי)/חוקותי תשמרו
ללכת בהם אני ה' אלהיכם עדיין יש תקוה ליצר הרע להרהר ולומר שלהם נאים משלנו
תלמוד לומר ושמרתם ועשיתם כי היא חכמתכם וביתכם.

Lest you should say: They have statutes and we have no statutes, Scripture says *You shall keep my ordinances, and my commandments/statutes you shall observe, to walk in them. I am the Lord your God* (Lev. 18:4). Still, *there is hope for the evil inclination to deliberate on it and say: Theirs are nicer than ours, [therefore] Scripture says, You shall observe and do [my ordinances], for it is your wisdom and your understanding [in the eyes of the nations, who, when they hear all these statutes will say ... What great nation has such statutes and ordinances such as this entire Torah?]* (Deut. 4:8)

This excerpt is meant to confront Jews who are seduced not just by Roman games, but by its law as well. The text emphasizes that Roman enticements may be jurisdictional and not merely aesthetic: "Still, there is hope for the evil inclination to deliberate on it and say: Their [laws and ordinances] are nicer than ours" (שלהם נאים משלנו). Roman laws challenge Sinai directly. The following passage sums up the pericope's treatment of the real intent of the incest laws – by delimiting acceptable sexual contact, Leviticus 18 also teaches Israel to avoid legal miscegenation:

ללכת בהם עשם עקר ואל תעשם טפלה ללכת בהם שלא יהא משאך ומתנך אלא בהם שלא
תערב בהם דברים אחרים בעולם.

To walk in them – treat them [my statutes and ordinances] as essential and not as peripheral. *To walk in them* – that your give and take should only concern them, that you should not mix them up with other things in the world.¹⁸

The figural treatment of the incest laws in these passages reveals a conceptual and exegetical connection between *hoq*, *mishpat*, and the lure of Roman/foreign laws and customs – these laws of sexual misconduct call Israel to be faithful to the Torah. Since the *'arayot* are repeatedly linked to Marah in the Mekilta we can argue that the Marah traditions echo this interest in and fear of gentile law.

Let us now return to Mekilta Vayassa 1, and Eleazar ha-Moda'i's second explanation of the term *mishpatim*. This reading further nuances the thematic bond between *mishpatim* and gentile law. The *dinim* generally cover *Neziqin*, damages, the name of this tractate in the Mekilta and the *mishpatim* that

¹⁸ Sifra, Aharei Mot 9.13.11 (Lev. 18:4).

comprise it.¹⁹ R. Eleazar ha-Moda'i's association of the *mishpatim* with Marah is part of the same tradition as that of Rabbi Judah. Following Judah, he maintains that the ordinances here in Exodus and beyond were already revealed at Marah. Even if his *gezerah shawa* is exegetically justified, why does he present it here?²⁰ Through the term *dinim* we arrive at another facet of the gentile/Jewish law conflict. The *dinim* (like the incest prohibitions above) are part of the so-called Noahide laws, laws that are incumbent upon all gentiles, and Marah is expressly used as a site at which this law common to all fuses with the corpus of *mishpatim* that were apparently given at Sinai.²¹ Indeed, in a *baraita* in b. Sanh. 56b Marah is the setting for a kind of proto-Decalogue:

תניא עשר מצות נצטוו ישראל במרה שבע שקיבלו עליהן בני נח והוסיפו עליהן דינין ושבת וכיבוד אב ואם דינין דכתיב שם שם לו חק ומשפט.

It was taught [in a *baraita*], Ten Commandments were commanded to Israel at Marah – the seven which the sons of Noah accepted upon themselves and they added to them the *dinin*, and the Sabbath, and the honoring of one's father and mother. The *dinin* – [how so]? It is written, *He set for him there a statute and an ordinance.* (Ex. 15:25).²²

The connection of the vast corpus of *dinim* (civil law) with the Noahide laws and Marah means we have entered a realm in which law is much more fluently associated, *mixed up* even, with law binding upon gentiles. In this set of rabbinic traditions, Marah consistently invokes an encounter with the laws of the gentiles.²³ In *The Image of the Non-Jew in Judaism*, David Novak argues that

¹⁹ The terms *mishpatim*, *dinim* and *neziqin* seem to intermingle throughout these traditions. Though it is difficult to find a common term for them in translation, I will employ the term "civil law" as a loose equivalent. Civil law encompasses private law (and even to an extent criminal law, which was part of the Roman domain of authority and so likely a sore spot in the apodictic hegemony of Sinaitic law). Watson notes that in Roman law criminal law falls into the category of private rather than public law, in *The State, Law and Religion: Pagan Rome* (Athens: University of Georgia Press, 1992), 103 n. 27.

²⁰ The word *mishpat* appears 426 times in the Hebrew Bible, 80 of which are in Exodus, Leviticus, Numbers or Deuteronomy. While the fuller use of the formula, "to set ordinances" is more limited, the boundaries of that which is to be compared in any analogy are protean. There is, therefore, nothing "natural" or intuitive about this analogy.

²¹ Note the commentaries and debates over what was already included before Marah and what was revealed there, what was binding upon whom, etc. See also b. Sanh. 56b, b. A.Z. 8b.

²² The text has a parallel in the Yalkut to Ex. 15:25. In that version we find listed 11 mitzvot revealed at Marah: 7 Noahide laws, circumcision, Jacob's sinew, Sabbath, and the law to honor one's parents.

²³ Some say that the *mishpatim* were not added to the *dinim* of the Noahides, but were largely identical, others that they were supplements exclusively for Israel. See b. Sanh. 56b, b. A.Z. 8b and commentaries.

Jewish interest in the Noahide law ... sets up a model for the interrelation between a revealed system of law and a non-revealed system of law ... [this] view forces Judaism to understand itself in relation to something outside its actual or even its potential control. As such the concept of *dinim* becomes the legal "border concept" (*Grenzbegriff*) between Judaism and the outside world.²⁴

Our pericope seems to recognize this point of contact, and struggles to determine how much can be shared, and how rigid or permeable the border.

Through the first half of the *lemma* in Exodus, *mishpatim asher tasim*, the midrash has questioned the location and content of the revelation of the law. While Ishmael says the *mishpatim* are Sinaitic, an alternative tradition transmitted by R. Judah, Simon ben Yochai and others connects the civil law with a previous revelation where legal space is shared.²⁵

The final two tradents in the pericope focus on the term לפניהם, before them in Ex. 21:1: *These are the mishpatim which you shall set before them*. R. Eleazar ben Azariah asks who "they" are, who is the intended constituency of the law. The two final tradents interpret the term "before them" as having to do with the parameters and functions of juridical authority in civil cases.

רבי אלעזר בן עזריה אומר והרי הגוים שדנו בדיני ישראל שומע אני יהיו דיניהם קיימים ת"ל ואלה המשפטים אשר תשים לפניהם אתה דן את שלהם והם אינם דינן את שלך מכאן אמרו גט המעושה בישראל כשר ובגוים פסול אבל גוים חובטין אותו ואומרים לו עשה מה שישראל אומרים לך.

Rabbi Eleazar ben Azariah says: Now whenever the gentiles were to judge according to the laws of Israel, I might think that their decisions are valid. Scripture says [to Moses] *And these are the ordinances which YOU shall set before them* – You [O Israel] may judge theirs but they may not judge yours. On the basis of this interpretation they [sages] say: A bill of divorce given by force, if by Israel it is valid, if by the nations, it is not valid. But [it is valid if] gentiles force him [the husband] and say to him: "Do as the Israelite authorities tell you."²⁶

Given the lack of rabbinic judicial authority in the tannaitic era this passage sounds fanciful – standing against the pervasive reality of the always immanent jurisdiction of Rome.²⁷ Seth Schwartz and others underscore what

²⁴ David Novak, *The Image of the Non-Jew in Judaism: An Historical and Constructive Study of the Noahide Laws* (Toronto: The Edwin Mellen Press, 1983), 56.

²⁵ While I haven't dealt with criminal law specifically in this paper, the corpus of laws introduced by our *lemma* (Ex. 21:1) includes much that would be considered criminal, and more significantly, capital crimes. These laws fall clearly into Roman jurisdiction in this period. This phenomenon supports my thesis that the transfer of the ordinances away from Sinai serves to neutralize the sting of fragile or lost legal authority. See also Lieberman, "Roman Legal Institutions in Early Rabbinics and in the Acta Martyrum," *JQR* 35 (1944), 1–55.

²⁶ See parallels in M. Git. 9:8; T. Yeb. 12:13.

²⁷ As Andrew Lintott says, despite the various configurations of provincial governance in the Empire, to focus on modes of indigenous self-governance "tends to obscure the fundamental homogeneity in the *Imperium Romanum* – the fact that the Romans expected their commands to be obeyed, even when they allowed a great deal of *de facto*

Schwartz calls Rome's "energetic imperialism" in the governance of annexed provinces, and the minor role played by the rabbis in what remained of Jewish judicial autonomy.²⁸ Schwartz asks bluntly, "Why should Jews have brought their legal problems to a judge who could execute his judgement only sporadically and furtively when the governor or the city councils ostensibly had full powers of compulsion?"²⁹ (And were likely also Jews themselves.) This would have been especially true for civil cases, where many Jews would have been compelled to shop around for the most advantageous jurisdiction, which may not have been the most pious.³⁰

Despite his strong claim to Jewish civil autonomy, Eleazar ben Azariah both rhetorically and specifically concedes a certain impotence to "rabbinic courts" when he acknowledges that gentiles might have to enforce Jewish sentences.³¹ The tension between defiance and dependence implicit in Eleazar

autonomy and frequently exercised power by indirect means," in *Imperium Romanum: Politics and Administration* (London: Routledge, 1993), 41. Compare S. Safrai, "Jewish Self-Government," in *The Jewish People in the First Century*, ed. S. Safrai and M. Stern (Assen: Van Gorcum, 1974), 398.

²⁸ The phrase is from Schwartz, see, *Imperialism* (107, 111–112); Similar points are made in H. M. Cotton, "Babatha," 100, 107 n. 4; H. Cotton, "Jewish Jurisdiction under Roman Rule: Prolegomena," in *Zwischen den Reichen: Neues Testament und Römische Herrschaft*, ed. M. Labahn and J. Zangenberg, TANZ 36 (Tübingen, 2001), 13–28; A. Lintott, *Imperium Romanum*, 40–66. The legal aspect of this claim is nuanced and modified by Hartmut Galsterer, "Roman Law in the Provinces: Some Problems of Transmission," in *L'Impero romano e le strutture economiche e sociali delle province*, ed. Michael H. Crawford (Como: Edizioni New Press, 1986), 13–27.

²⁹ If this was true for the early patriarchs, so all the more so for the rabbis. See also Schwartz, review of *The Monarchic Principle: Studies in Jewish Self-Government in Antiquity*, by David Goodblatt, *JJS* 47.1 (1996), 168.

³⁰ Alon, *The Jews in their Land*, 212–216. See also y. Meg. 3, 74a, in which Rabbis Hiyya, Jose and Ammi attempt to bribe a Roman judge not to hear a case of a certain Tamar, against whom they had passed a judgement that she "appealed" to the Roman venue; b. A.Z. 8b also states that after the Second Commonwealth, Rabbis no longer heard cases dealing with monetary penalties. See also Cotton, "Jewish Jurisdiction under Roman Rule," 18; Rabello, "Jewish and Roman Jurisdiction," in *Jewish Law*, ed. Hecht et al. (Oxford: Clarendon, 1996), 145–146, 148; Bernard Jackson, "On the Problem of Roman Influence on the Halakah," in *Jewish and Christian Self Definition* ed. E. P. Sanders, A. I. Baumgarten, A. Mendelson (Philadelphia: Fortress Press, 1981), 2:164; Hannah Cotton, "Babatha," 94–108; Berahyahu Lifshitz in "The Rules Governing Conflict of Laws Between a Jew and a Gentile According to Maimonides," in *Mélanges a la Mémoire de Marcel-Henri Prévost* (Paris: Presses Universitaires de France, 1982), 179–189; A. Oppenheimer, "Jewish Penal Authority in Roman Judea," in *Jews in a Graeco-Roman World*, ed. M. Goodman (Oxford: Clarendon, 1998), 188–189. Cotton notes "that non-citizens had recourse to Roman courts of law and Roman law long before 212, and this does not seem to have required the grant of special privilege," in "Jewish Jurisdiction under Roman Rule," 15; cf. A. N. Sherwin-White, *The Roman Citizenship* (London: Oxford University Press, 1973), 275–287.

³¹ The tension at work in Eleazar ben Azariah's ruling constitutes an interesting parallel to the Mishnah, whose legislation, according to Schwartz, "is frequently char-

ben Azariah's ruling is interestingly echoed in a fourth c. Roman law on Jewish jurisdiction, (found in the Theodosian Code, 438 C.E., but dated to Honorius, 398 C.E.):

The Jews who live under the Roman common law shall address the courts in the usual way in those cases which do not concern so much their superstition (*superstitio*, parallel *religio*) as court, laws and rights, and all of them shall bring actions and defend themselves under Roman laws ... Certainly, if some shall deem it necessary to litigate before the Jews or the Patriarchs through mutual agreement, *in the manner of an arbitration (ad similitudinem arbitrorum)* with the consent of both parties and *in civil matters only*, they shall not be prohibited by public law from accepting their verdict; the governors of the provinces (*provinciarum iudices*) shall even execute the sentences as if they were appointed arbiters through a judges award. (CTh 2.1.10)³²

This law is post-tannaitic, but it is relevant here not for its details or the fact that it was articulated in the fourth century,³³ but for the information it brings to the midrashic text at hand. Though late, this text likely reflects the general parameters of the Roman position on Jewish jurisdictional autonomy, even in the tannaitic era, namely that there was none. For the Romans any Jewish civil law would have been merely arbitrational. However, the Romans seem to have had no interest in prohibiting voluntary mediations.³⁴ By heuristically refracting the Mekilta passage through the Theodosian Code a few elements come into relief. According to the Roman law, (1) all adherence to Jewish civil authority was voluntary, *in the manner of an arbitration*; (2) the Romans were not interested in regulating a sub-category of Jewish law which they called *superstitio* (thereby applying an alien legal category to Torah); and (3), if individuals did submit to voluntary arbitration, the Romans had an interest in enforcing the decision. Harries, reading Ulpian (d. 228) and others, states: "The jurists' guidelines sought to ensure that arbitration did its job, that it finished the case."³⁵

acterized by tension, sometimes explicit, sometimes subtle, untheorized, perhaps even scarcely conscious, between what may have been popular conceptions and practices and rabbinic formalism." *Imperialism*, 235–236.

³² Amnon Linder, ed. *The Jews in Roman Imperial Legislation* (Jerusalem: The Israel Academy of Sciences and Humanities, 1987), 204–211 (no. 28). Translation his, emphases mine.

³³ Linder gives an outline of some of the issues in *The Jews in Roman Imperial Legislation*, no. 28, 204–211.

³⁴ Cf. Schwartz, *Imperialism*, 111; Galsterer, "Roman Law in the Provinces," 20; Harries also remarks on the Roman reliance on arbitration and other extra-judicial processes to handle the legal demands of Romans as well as provincials, in *Law and Empire in Late Antiquity* (Cambridge: Cambridge University Press, 1999); 101, 172–184; G.P. Burton "Proconsuls, Assizes and the Administration of Justice under the Empire," *JRS* 65 (1975), 92–106; H. Cotton carries Burton's observations further by inferring that the paucity of Roman judges in the provinces would have motivated Jews to seek out extra-legal authorities, see *idem* "Jewish Jurisdiction under Roman Rule," 20.

While Eleazar's exegesis here tells us little about how rabbis functioned legally, it is suggestive as to the sort of apprehension provoked in the contemplation of jurisdictional redundancy in civil cases. Rabbi Eleazar ben Azariah's presumptions invert the first of the CTh rules by asserting that adherence to rabbinic "civil" authority was mandatory ("civil matters" in this passage may explain the *mishpatim/nezikin* mentioned in the midrash). The second half of his *derash*, however, may well reflect Roman practice as regards enforcement. Through the lens of Roman perception as depicted in this law, Eleazar appears to embrace part of the architecture of arbitration, while working to fortify the inevitably weaker jurisdictional boundaries that accompany it.³⁶

The implications of voluntary jurisdiction (arbitration) on the rabbis would have been complicated. On the one hand, it provided a certain freedom to engage within an inner circle willing to abide by the "moral authority" of Torah law, according to its own internal rules and regulations. As Harries says of the Roman laws,

In practice, arbitration was flexible and not bound by the constraints of normal jurisdiction. How it operated in practice therefore depended entirely on the conventions accepted by the parties, which could be shaped by local customs, consistent with the minimal Roman rules but with characteristics of their own.³⁷

We might imagine a small community in which litigants volunteer to abide by the strict letter of rabbinic law, all the while knowing that they are, technically, in arbitration.³⁸ In order to foster and maintain such loyalty, the rabbis would have had to rely on their persuasive powers.³⁹ Eleazar ben Azariah's

³⁵ J. Harries, *Law and Empire*, 179. Ulpian, in the Digest, underscores that the Roman praetor had an interest in promoting the outcomes of arbitration/extra-judicial law: Even though the praetor compels no one to undertake an arbitration, since the matter is free and without restriction and there is *no necessity to exercise jurisdiction*, the praetor considers that the matter now *attracts his care and anxiety* (Ulpian, Edict 13, Digest 4.8.2.1, emphasis mine).

³⁶ Cotton, "Jewish Jurisdiction under Roman Rule," where she avers that even Roman jurisdiction was not as institutionalized as it appears to be in CTh 2.1.10.

³⁷ Harries, *Law and Empire*, 179.

³⁸ Elon calls arbitration "a substitute for judicial autonomy," in Elon, ed., *The Principles of Jewish Law* (Jerusalem: Keter Publishing, 1975), 566. H. Lapin says "The phenomenon of rabbis judging does not appear to be connected to any clear institutional structures, and is perhaps better understood as a role that rabbis played primarily for adherents." In "Rabbis and Cities: Some Aspects of the Rabbinic Movement in its Graeco-Roman Environment," in *The Talmud Yerushalmi and Graeco-Roman Culture*, vol. 2, ed. Schäfer and Hezser (Tübingen: Mohr-Siebeck, 2000), II.63.

³⁹ Hezser argues that the rabbis' authority rested on their reputation, not their office, and that their "influence depended on ... people's attitude toward rabbis in general and the Torah as Divine heritage and/or symbol of Jewish identity at a time of foreign domination." In Catherine Hezser, *The Social Structure of the Rabbinic Movement in Roman Palestine* (Tübingen: Mohr Siebeck, 1997), 450; see also H. Lapin, "Rabbis and Cities," II.58.

derash attends to this notion of inner compulsion defined by "conventions accepted by the parties."⁴⁰ Still, such parties may have been very few indeed.⁴¹

Eleazar ben Azariah's rhetoric assumes significant legal authority. However, without the power to enforce the law, upon whom would this pronouncement have been binding? By outlawing recourse to foreign courts, Eleazar presumes his audience to be Jews for whom his authority is sufficient. The persuasive structures that would need to be in place to draw a Jew away from institutions of more tangible power are explicitly addressed in the midrash of Rabbi Akiba.

רבי עקיבא אומר ואלה המשפטים וגו' למה נאמר לפי שהוא אומר דבר אל בני ישראל ואמרת אליהם אין לי אלא פעם אחת מנין שנה ושלוש ורבע עד שילמדו ת"ל ולמדה את בני ישראל יכול למדין ולא שוין ת"ל שימה בפיהם יכול שונים ולא יודעין ת"ל ואלה המשפטים אשר תשים לפניהם ערכם לפניהם כשלחן ערוך כענין שנאמר אתה הראית לדעת.

Rabbi Akiba says: *And these are the ordinances ...* – Why is this said? Since it says, *Speak to the children of Israel and say to them ...* (Lev. 1:2) – I only know that he was to tell them once. How do we know that he was to repeat it to them a second, third and fourth time until they have learned it? Scripture says, *And teach it to the children of Israel* (Deut. 31:19) – This might mean that they should learn it and not repeat it. Scripture says, *Put it in their mouths* (Deut. 31:19) – This might mean that they need only to repeat it and not understand it. [Therefore] Scripture says, *And these are the ordinances which you shall set before them* – Arrange them in proper order before them like a set table, as it says, *It was shown to you so that you might know* (Deut. 4:35).

Akiba interprets the second half of the verse: *And these are the ordinances which you shall set before them*, as a command concerning proper legal pedagogy.⁴² The law must not just be presented to Israel, but Israel must also repeat it and ultimately *know* it. By worrying about the young Jew's training in the Torah, he is inhabiting a realm – the school or *bet midrash* – that is governed by Sinaitic law, yet it exists outside of Roman authority. Moreover, if the law is properly taught and learned, then the Jewish self becomes a guardian of Jewish jurisdiction by means of his own cultural and intellectual ownership of the Divinely revealed tradition.⁴³ *Tradition* will guide him to respect the boundaries of Jewish jurisdiction. Seen in the context of Eleazar ben Azariah's statement, Akiba's *paideia* is meant to instill an internalization (through study) that will prevent the situation of dual allegiance encountered by Eleazar ben Azariah.

⁴⁰ Harries, above n. 37

⁴¹ Especially if Schwartz is right when he argues that for Jews in the years following 135 C.E., Judaism was no longer "the organizing principle of the public life," in *idem*, *Imperialism*, 135.

⁴² Like Eleazar ben Azariah, he shifts genre, treating a narrative as law.

⁴³ See Martin S. Jaffee, *Torah in the Mouth: Writing and Oral Tradition in Palestinian Judaism, 200 B.C.E.–400 C.E.* (Oxford: Oxford University Press, 2001), 153–156.

Akiba's *derash* has another effect: it claims authority here for the *rabbinic* project of legal interpretation and codification. The concern for repetition (שׁוּנִין) alludes to the Mishnah (מִשְׁנָה). In Akiba's reading of Ex. 21:1, Mishnaic law is given Sinaitic authority by the commands to tell, teach, learn, and understand. *Knowing*, which follows repetition (*shonin*), is possible only with the help of the proper arrangement of the law (כְּשִׁלְחָן עֵרוֹךְ) – and this arrangement is the Mishnah.⁴⁴ Akiba has intertwined the revelation at Sinai with rabbinic authority here. This appropriation of legal understanding is another defiant gesture and makes a grand claim given the narrow range of rabbinic influence in the Jewish community at this time.⁴⁵

Akiba manages to find a realm of Jewish halakhic authority wherein moral sanction counters the temptations and attractions of Roman power, reinforcing and extending Ishmael's interpretation above.⁴⁶ In Eleazar we find an acknowledgment that Jews have been frequenting Roman legal venues, and a demand that they return to rabbinic legal arbiters. Akiba presents a manual on how to create the type of Jew for whom Eleazar's command would be authoritative.

Thus far, having established that rabbinic authority was, where extant, confined to arbitration (from the Roman point of view), I have been arguing that this pericope from Mekilta Neziqin 1 attempts to mediate this historico-legal reality and the terms and demands of a revealed law. Note that in tannaitic law there is a category of arbitration (פְּשָׁרָה/בִּיצוּעַ *pesharah* or *bitzuah*)⁴⁷ which is specifically rabbinic and differs from the Roman category. Rabbinic arbitration stands in opposition to strict justice (דִּין). Nonetheless, while the law itself seems to differentiate between arbitration and strict law, from the Roman perspective the bulk of functioning Jewish law would have been mediation (*ad*

⁴⁴ Akiba is often portrayed as a great arranger of the Mishnah, see Avot de-Rabbi Natan 18. Rashi on this verse: אֲשֶׁנָּה לָהֶם הַפֶּרֶק וְהַלְכָּה ב' או' ג' פְּעָמִים עַד שֶׁתֵּהָא סְדוּרָה בְּפִיָּהֶם כְּמִשְׁנָתָהּ.

⁴⁵ See Catherine Hezser, *The Social Structure of the Rabbinic Movement*, 151–154, 383–394, 450–466, and *passim*; and Lee I. Levine, *The Rabbinic Class of Roman Palestine in Late Antiquity* (New York: JTSA, 1989), 98–105.

⁴⁶ In rabbinic exegetical tradition, biblical texts become linked to other texts which shape the questions and approaches that rabbinic interpreters bring to it, containing midrashic play. Ex. 21:1 seems to be part of at least two interpretive complexes: one concerns rabbinic pedagogy, the other jurisdiction. The original locus of Akiba's interpretation to Ex. 21:1 is hard to determine. While we find it embedded in discussions of rabbinic pedagogy, especially emphasizing oral learning and Oral Torah (see i.e. b. Er. 54b cited in Jaffee, *Torah in the Mouth*, 4), its presence here in a debate over jurisdiction at the head of tractate Neziqin gives the *derash* additional significance. The locus of rabbinic legal authority rather than pedagogy is the organizing theme of this pericope.

⁴⁷ On terms in tannaitic materials see Menahem Elon, "Compromise" and "Arbitration," 565–573; and Asher Gulak, *Yesode ha-mishpat ha-'ivri. Seder dine mamnot be-Yisra'el 'al pi mekorot ha-Talmud voha-Poskim* (Berlin: Devir, 1922).

similitudinem arbitratorum). In the mind of the third century (legal) exegete, there may well have occurred some overlap between the ideal situation of the court and more realistic modes of voluntary recourse, and we might reasonably expect the insider term to reflect to some degree on the colonial scene. Disputations on the forms of, the merits and demerits of arbitration and strict justice must be heard in this redoubled context.⁴⁸ This (contextual) play would be all the more pronounced in aggadic literature, where signification is more suggestive, affective, and many-layered.

I have embarked on a discussion of arbitration for a number of reasons. First, let me be clear that when I speak of arbitration in this aggadic context, I understand the term as a symbol and sign more than a legally specific institution. The passage in the Mekilta is an ideological debate, not one about the workings of the courts. It expresses a voluntary, negotiable, and flexible relationship to the law. Second is the simple observation that, if arbitration was a base line reality for Jewish civil authorities in the Roman Empire in the third century C.E., then the extent to which the rabbis embraced or incorporated a reduced notion of Torah's autonomy in civil procedure would determine the ease with which they would or would not get along in the legal world of Roman Palestine.⁴⁹ A third reason to think about arbitration is that it provides the conceptual/legal context within which Eleazar's interpretation makes sense. Finally, I will argue that an idea of legal compromise is the silent player in the last midrash in the pericope, that of Simon ben Yochai, as well.

רבי שמעון בן יוחי אומר מה ראו דינין לקדם לכל המצות שבתורה שכשהדין בין אדם לחבירו תחרות ביניהם ותפסקו להם הדין נעשה שלום ביניהם וכן יתרו אומר למשה אם את הדבר הזה תעשה וגו' וגם כל העם הזה על מקומו יבא בשלום.

Rabbi Simon ben Yochai says: Why do the ordinances of the law precede all the commandments of the Torah? Because as long as there is a law suit between a man and his neighbor, there is strife between them – but as soon as the case is decided, peace is established between them. And therefore Jethro says to Moses, *If you do this thing [as God commanded you, you will be able to endure,] And all this people shall go to his place in peace* (Ex. 18:23).⁵⁰

Like Eleazar ben Azariah, Simon's interpretation builds on the term *lifnehem* ("before them"). Simon assumes a pre-Sinaitic revelation of the *mishpatim*,

⁴⁸ In B. Cohen, "Arbitration in Jewish and Roman Law," in *Jewish and Roman Law: A Comparative Study* (New York: JTSA, 1966), 667. See for example Sifre Deut. 17; b. Sanh. 6a/b; Elon, 566; Gulak's note that rabbinic arbitration uses a three man court, replicating the civil court.

⁴⁹ In *Jewish and Roman Law*, 667, Boaz Cohen wrote, "Arbitration is of singular significance to students of legal history and comparative law, for it constitutes one important method whereby foreign rules of law could be admitted into another system, especially in proceedings involving civil cases."

⁵⁰ The full text of Ex. 18:23 reads: *אם אתה תדבר הנה תעשה וצורך אלהים ויכלת עמך וגם בל-העם הזה על-מקומו יבא בשלום.* *If you do this thing, God will command you, and you will be able to stand/endure, and also all this people will go to his place in peace.*

and so interprets the *lemma* to mean, *These are the ordinances which you shall set before them*, before the commandments that Israel will soon receive at Sinai. In addition, for Simon temporal priority implies a conceptual priority – because it ensures peace. Implementation of a mundane realm of *mishpatim* is a crucial preparation for accepting higher religious content. Simon speaks as a theological insider whose concern is for peace, harmony, and the proper reception of God. However adjacent literature preserves some hints that in this context Simon's interpretation, like Eleazar ben Azariah's, functions to engage the problem of jurisdiction in the face of foreign power.

One wonders why Simon calls on Jethro. Jethro is Moses' Midianite father-in-law, and in this scene he appears, before Sinai, and advises the overburdened Moses to appoint elders to help him judge the people. While other midrashim dramatically downplay Jethro's role,⁵¹ Simon grants him immense importance. The foreigner Jethro marks a gentile incursion into the law, be it as proselyte or idolator.⁵² The inclusion of this exegesis in the pericope implies that for Simon the pre-Sinaitic laws which Moses adjudicates with Jethro's help are precisely the *mishpatim* that are introduced at Exodus 21:1ff, but are assumed to have been revealed previously, presumably at Marah. Moreover, related aggadic traditions surrounding Jethro's arrival mark the scene as the establishment of a compromise-based mode of jurisprudence.⁵³ Sifre Deut. 12 on Deut. 1:12 – the biblical doublet of the Exodus scene with Jethro – shows Moses struggling with litigants who appear to control the legal proceedings:

איכה אשא לבדי טרחכם מלמד שהיו טרחנים היה אחד מהם רואה שני נוצח בדין אומר יש לי עדים להביא יש לי ראיות להביא למחר אני דן מוסיף אני עליכם דיינים לכך נאמר טרחכם מלמד שהיו טרחנים.

How can I myself alone bear your burden (טרחכם)? (Deut. 1:2) – This teaches that they were troublemakers (טרחנים). If one of them saw the other besting him in a lawsuit, he would say, "I have [more] witnesses to bring"; "I have [new] evidence to present"; "I want a postponement until tomorrow"; or "I want additional judges." Hence it is said, *Your burden*, teaching that they were troublemakers.

This scene does not depict a cleanly running court with fixed procedures, but it shows the parties themselves determining the civil process. This is typical of a voluntary, arbitral mode of jurisprudence. Alon concurs, with additional

⁵¹ In other places in this midrash, in order to account for a number of perplexing anachronisms in Exodus 18, the Jethro scene is moved ostentatiously after Sinai (Amalek 3, JZL 2:162, H-R 188).

⁵² Jethro is a complicated and conflicted character in the Mekilta. He is the ideal proselyte, exemplifying Judaism's universalist ideal (Amalek 3, JZL 2:173, also 175, 177; also see Marc Hirshman, "Rabbinic Universalism in the Second and Third Centuries," *HTR* 93:2 (2000), 110). However, in other places the Mekilta depicts him as a priest of idolatry, a tempter and general bad guy who demands that Moses give his first son over to pagan worshipping (Amalek 3, JZL 2:163, 168–169, H-R 191). Elsewhere Jethro is shown worshipping any and every idol (Amalek 3, JZL 2:176, H-R 194).

⁵³ M. Elon, "Arbitration," in *The Principles of Jewish Law*, 565.

support from T. Sanh. 6:4, "Judges may be added to the panel at any time until the case is closed."⁵⁴ An aggadic connection between the elders appointed in Ex. 18/Deut. 1 and the idea that the elders assigned by Moses as judges were engaged in arbitration is echoed in a neighboring *derash* in Sifre Deut. 17. Here discussion concerning the attributes of the judges appointed by Moses draws the *derash* into an explicit debate over the merits of arbitration.⁵⁵

ואלה הדברים אשר תעשו דברו אמת איש לרעהו אמת ומשפט שלום שפטו איזה הוא שלום
יש בו משפט אמת הרי אומר זה ביצוע.

*And these are the things that you shall do: every man shall speak the truth with his neighbor, execute judgement of truth and peace (Zech. 8:16). What kind of peace includes a judgement of truth? Behold, you must say arbitration.*⁵⁶

Peace here, and elsewhere, is the unique result of arbitration.⁵⁷ T. Sanh. 1:3 states, "Surely where there is strict judgement there is no peace and where there is peace there is no strict justice! But what is the kind of justice in which peace abides? Arbitration." The links binding Jethro, the pre-Sinaitic *dinim*, peace and arbitration occur in the Mekilta (Amalek 4) as well, commenting on Ex. 18:16:

כי יהיה להם דבר בא אלי בין טומאה לטהרה ושפטתי בין איש זה הדין שאין בו פשרה ובין
רעהו זה הדין שיש בו פשרה מגיד שניהם נפטרים זה מזה כרעים.

When they have a matter, it comes to me – this is a matter of uncleanness and cleanness. *And I judge between a man* – this is strict judgment in which there is no compromise (זה הדין שאין בו פשרה), *and his neighbor* – this is a judgement where there is compromise (זה הדין שיש בו פשרה), for it speaks of the two of them [the litigants] parting as friends.⁵⁸

⁵⁴ Alon, *The Jews in their Land*, 219–220.

⁵⁵ See parallels T. Sanh. 1:3 (y. Sanh. 1:1; b. Sanh. 6b).

⁵⁶ The passage continues: רבן שמעון בן גמליאל אומר המעלה את הקטן למקום גדול והגדול למקום קטן זה ביצוע וחכמים אומרים כל המבצע הרי זה חוטא ... R. Simeon ben Gamaliel says: 'What raises the small to the place of the great and lowers the great to the place of the small is arbitration,' hence sages say, 'He who prescribes arbitration is a sinner ...' This debate is much like the one found in Seneca, cited in Harries, *Law and Empire*, 174 n. 7 and B. Cohen, *Jewish and Roman Law*, 670–71, suggesting that a strong case should go before a judge and benefit from strict justice, instead of being subjected to the vagaries of *humanitas* and *miserecordia*.

⁵⁷ Compare C. Hayes for a similar legal negotiation as regards the justification for *taqqanot*, another sort of challenge to Sinai – phrases in this regards include "according to the ways of peace," "because the situation necessitates it," "to safeguard the law," "in order to repair the world," in "The Abrogation of Torah Law: Rabbinic *Taqqanah* and the Praetorian Edict," in *The Talmud Yerushalmi and Graeco-Roman Culture*, vol. 1, ed. Peter Schäfer (Tübingen: Mohr Siebeck, 1998), 668–669.

⁵⁸ JZL 2:180, H-R 196. It is likely that the law of "cleanness and uncleanness" would be one realm of fairly strong rabbinic influence, and no Roman interference. That is, there would be no need for compromise. See S. J. D. Cohen "The Place of the Rabbi in Jewish Society of the Second Century," in *The Galilee in Late Antiquity*, ed. Lee I. Levine (New York: Jewish Theological Seminary, 1992), 160–164.

In this passage both forms of judicial process precede Sinai, but only one permits peace between the litigants so that they part as friends – Simon's ideal *telos* (בין אדם לחבירו).⁵⁹ In sum, there is a wide tradition in aggadic midrash which sees arbitration as a means which permits *mishpat* and *shalom* (civil law and peace) to coexist, specifically in turning litigants into friends. I believe that Simon's *derash* alludes to and presupposes this nexus.

One might object that given Simon ben Yochai's staunch anti-Roman feelings, he would never take such an apparently moderate, even accommodationist, position. Yet Simon's anti-Roman personality is fully developed in the *gemara* only. In the *Mekilta* we have no hint of it. Though Simon is widely cited, he never accrues any definable exegetical personality. Of his 41 appearances, nine (36 %) show conflicting attributions in the manuscripts. Of the remaining 32 citations, in 47 % he appears as one of several tradents in exegetical lists of rabbinic opinions brought to bear on a verse. The midrashic significance of his interpretation is a creation of the editors of the discrete lists. That is, as conceived by the *Mekilta*'s redactor, Simon ben Yochai's identity and function appears to be largely that of an authoritative but generic *tanna*. Secondly, even if we grant a residual conservatism to Simon's politics, his argument is couched in the terms of insiderness – he never cedes that Moses' adjudication is non-rabbinic, nor that the legal authority of Marah is anything but Torah itself. However, I am arguing that the significance of the passage as a whole is larger than this.

It remains to be asked, why would the rabbis move the *mishpatim* away from Sinai? Like Rabbi Judah, Simon ben Yochai executes a strategy of displacement, and so avoids the demands for exclusivity and sovereignty inherent in the Sinaitic claim. Marah is a legal no man's land, a safe zone in which the law more easily accommodates foreign interference and influence.⁶⁰ By moving the bulk of the common laws outside the boundaries of Mt. Sinai, the rabbis can avoid the most threatening jurisdictional, political, and ultimately theological confrontations.⁶¹ Jethro's hand in the making of the system of

⁵⁹ In the midrash on Ex. 18:7, וישאלו איש-לרעהו לשלום, *They wished each other peace, each man to his friend* – the two friends here are Moses and Jethro, the Israelite and the foreigner ... which may be an allusion to the function of compromise as a way to have calm relations with Rome.

⁶⁰ We know that the Romans have co-opted jurisdiction in capital cases, and these laws are part of the *mishpatim* alongside the civil law. This portion of the law is, at the very least, relieved of some "Sinaitic pressure" by being moved to more neutral ground.

⁶¹ This strategy is the complement and inverse of one noted by Jackson regarding the biblical placement of the Decalogue in divine rather than human jurisdiction. He says, "[O]ne reason, (often not the only one) for the use of divine justice is the fact that the dispute has an international flavour, thus highlighting the absence of an appropriate human power-centre." "The Concept of Religious Law in Judaism," in *Aufstieg und Niedergang der Römischen Welt* II 19.1 (Berlin: De Gruyter, 1979), 42. Whereas the rabbis in *Neziqin* transfer the ordinances to the more profane realm of Marah because

compromise lays the groundwork for peace – imagined as a cooperative venture – much like the relationship induced by R. Eleazar ben Azariah. The sooner the Jew accepts Jethro's advice, the better able is he to accept whatever "commandments" (מצוות) Simon thinks *were* revealed at Sinai. Furthermore, Jethro's is a peace that protects Sinai. Such accommodation then is like a fence around the Torah.⁶² This strategy is typical of what Moshe Halbertal calls an "introversion of aggression – a modification of strong dichotomies in order to minimize consequences."⁶³

Conclusion

Mekilta Neziqin 1 looks closely at the revelation of the *mishpatim* and locates this legal corpus within a particularly intricate matrix of ideas. The various terms, tradents, and motifs that are associated with a verse influence the ways in which this verse can be perceived and understood. They comprise ruts in the earth that direct thinking toward and through certain ideas. A number of compelling themes and texts transect the exegetical axis between Marah and the covenant code, which together paint a picture of rabbinic wrestling with the loss of civil authority. Foreign power enters the midrash from a number of directions. First, Marah and the *mishpatim* are associated with the Noahide laws, so that Marah becomes a site where Israel and the gentiles inhabit a shared legal space. Second, Marah and *mishpatim* are triangulated with the 'arayot, the laws against incest. In the Mekilta d'Arayot these laws spark a great deal of anxiety about the dangers of Roman legal and cultural influence. Third, Eleazar ben Azariah plainly invokes concern about jurisdictional autonomy in a redundant system which stands in competition with presumably Roman courts, Roman laws, and Roman power. Eleazar's reading echoes the Roman perception of Jewish jurisdictional freedoms, confirming, against his stated intention, that such freedoms rely on voluntarism, and so on Rabbinic moral authority. Akiba's *derash* underscores the importance of the commodities of persuasion and pedagogy in rabbinic legal thinking.

there is no adequately sanctioned power center, so here, Jackson says, the Decalogue is given special divine sanction for the same reason.

⁶² In Sifre Deut. 16, the injunction to "build a fence around the Torah," is in the same *piska* as the one which prescribes the adjudication between a Jew and a gentile by Jewish judges. In so doing Simon may be referring to the Roman categories *ius* and *fas* – safeguarding Sinaitic *fas* with a buffer of *mishpatim/ius*.

⁶³ Halbertal's neutral space of the Roman bath as he interprets it is a geographical analogue to this historical sleight of hand, see *idem*, "Coexisting with the Enemy: Jews and Pagans in the Mishnah," in *Tolerance and Intolerance in Early Judaism and Christianity*, ed. G. Stanton and G. Stroumsa (Cambridge: Cambridge University Press, 1998), 166–169.

Threaded throughout this matrix of concerns is the idea of arbitration – a symbol of certain power relationships and of a flexible stance toward the law. Not only is arbitration the legal-historical reality in the tannaitic era, but Eleazar ben Azariah's prescriptive appears to presume it. This idea frames the more exclusionist voices of Ishmael and Akiba as well, turning their exegeses into assertions of resistance to shared legal power or lost authority over the *mishpatim*. Moreover, Simon ben Yochai draws the foreigner Jethro into the pericope, and with him, allusively, a tradition of the establishment of arbitration, as well as an echo of the concern for a form of civil judgment that creates peace between a person and his neighbor. This is arbitration, effecting peace through compromise. It is probably not incidental that this happens to be the historical status quo, imposed from outside.

R. Judah and other sages mentioned in this pericope dislocate many laws from Sinai. What is left? The Decalogue, though in the Mekilta, its status as law *qua* law is less than clear, and moreover, two of the commandments are themselves transported to Marah (honor one's parents/Sabbath).⁶⁴ One theological/exegetical perspective assumes that since the entire Torah is from Sinai there cannot be any extra-Sinaitic law, and this includes even Marah. However, in the texts I have discussed the very nature of Torah/Sinai is at issue. The collocation of ideas circulating around Marah and the *mishpatim* is due to the contested nature of the bond between revelation and civil law – and their respective (and competing) authorities. The rabbis claim to control revelation, but to what extent do they control the civil law? At the end we are left to ponder just what in this schema was revealed at Sinai? Perhaps, I suggest, what remains is *quae ad superstitionem eorum*.

I cannot help recounting a *marshal* from Ex. R. 30:3 which dramatizes the thematics of this pericope, or rather, my interpretation of it. I paraphrase: There once was a rich *matrona* who needed protection when she went about, so two guards with swords would attend her, one walking in front, the other walking behind her. So too with the Ten Commandments (*mitzvot*). They needed protection so the *dinim* would walk in front of them (*And he set there a statute and an ordinance*, Ex. 15:25) and the *dinim* would walk behind them (*And these are the ordinances*, Ex. 21:1). In public spaces the Decalogue is vulnerable. According to this parable, it requires the protection provided by the *mishpatim* revealed at Marah and Sinai. The theological meaning of the parable is, I think, clear. In addition, however, there is a social comment encoded in this recasting of the *mishpatim* – here the ordinances are moved from the center. They are not dramatized as a part of a seamless revelation at Sinai, but seem to be another class of laws, apparently demoted (though not

⁶⁴ In a parallel in Mekilta Vayassa 1 (JZL 2:95, H-R 157) all ten commandments are said to have been revealed at Marah. For a different function of this exegetical move see Jaffee, *Torah in the Mouth*, 88–92.

dispensable). The fact that the *mishpatim* are depicted as sword-wielding guards both appropriates and implicates a potent Roman symbol.⁶⁵ In my view, this late midrash from Exodus Rabbah is a commentary on our pericope and its parallels and distills them to their homiletical and socio-historical essence. As in Mekilta Neziqin 1, some laws are specified so as not only to prepare one to receive the others properly, but also to protect the core by providing a buffer between inside and outside.

This article is not a study of law in a comparative context, an attempt to trace influence, transmission or legal detail. Rather, I have looked at aggadic texts on the basis of socio-historical hermeneutical parameters, to investigate the idea of law and legal power in a rabbinic text-matrix as it is refracted through Roman legal presence, and to see the symbolic accretions around the idea of the civil law, in order to determine what motivates tannaitic exegesis and composition. In his book *Economy, Geography, and Provincial History*, Hayim Lapin says that "subject populations do not so much autonomously 'make their own history' as come to terms with a political economy that is only ever partly of their own making."⁶⁶ Likewise, this midrash preserves a wide range of opinions on the *proper place* of the *mishpatim*. In no case are the laws assumed to be the pristine possession of a sovereign God. Instead the law struggles to locate itself. Even in the ideological space of midrash, each rabbi responds in his own way to a world that is only partly of his own making.

⁶⁵ On the image of the sword and Roman power in tannaitic midrash see Dohrmann, "Analogy, Empire and Political Conflict" *JJS* 53:2 (2002), 280–286.

⁶⁶ Hayim Lapin, *Economy, Geography*, 11.

Rabbinic Law in its Roman and Near Eastern Context

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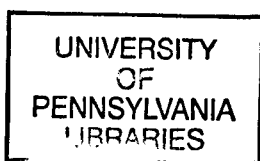
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